IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

CIVIL ACTION NO. 3630

EARL BENJAMIN BUSH, ET AL.,

Plaintiffs,

versus

ORLEANS PARISH SCHOOL BOARD, ET AL.,

Defendants.

~~CIVIL ACTION NO. 10329~~

HARRY K. WILLIAMS, ET AL.,

Plaintiffs,

versus

JIMMIE H. DAVIS, GOVERNOR OF THE STATE OF LOUISIANA, ET AL.,

Defendants.

CIVIL ACTION NO. 10566

UNITED STATES OF AMERICA,

Plaintiffs,

versus

STATE OF LOUISIANA, ET AL.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION, SITTING AS A THREE-JUDGE COURT.

SAMUEL I. ROSENBERG,
PETER H. BEER, WILLIAM CAMPBELL, JR.,
WILLIAM B. DREUX, JAMES H. DRURY,
LUCIEN M. GEX, JR., WILLIAM J. GUSTE, JR.,
VICTOR H. HESS, JR., W. FORD REESE,
JOHN H. HURLEY, RALPH N. JACKSON,
WALTER J. LANDRY, JOSEPH McCLOSKEY,
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APPELLANTS.

HAUSER PRINTING CO., INC., NEW ORLEANS

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JURISDICTIONAL STATEMENT

(a) Earlier opinions rendered in this cause are reported in: 138 F. Supp. 336, aff'd, 242 F. 2d 156, cert. denied, 354 U.S. 921; 163 F. Supp. 701, aff'd, 268 F. 2d 78; 187 F. Supp. 42.

(b) The opinion delivered upon the rendering of the judgment sought to be reviewed is set forth in Appendix A.

The Temporary Injunction issued in connection therewith is set forth in Appendix B.

The Order requesting and authorizing the United States to appear in *Bush* and *Williams*, as *amicus curiae*, is set forth in Appendix C.

(i) This proceeding was originally a class action brought by Negro plaintiffs, individually and on behalf of their minor children, for themselves, and others similarly situated, seeking to gain admittance to previously all-white public schools in the Parish of Orleans; and was brought under the Equal Protection of the Laws and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

(ii) The judgment sought to be reviewed was filed November 30, 1960, and was entered December 2, 1960.

Notice of Appeal was filed in the United States District Court, for the Eastern District of Louisiana, New Orleans Division on the 5th day of December, 1960.

(iii) Jurisdiction of this appeal is conferred on this Court in 28 U.S.C. §1253.

(iv) Cases believed to sustain the jurisdiction of this Court are:

Radio Corp. of America v. U. S. (D.C. Ill. 1950) 95 F. Supp. 660, aff'd, 71 S. Ct. 806, 341 U.S. 412, 95 L. Ed. 1062;

St. John v. Wisconsin Employment Relations Board (1951) 71 S. Ct. 375, 340 U.S. 411, 95 L. Ed. 386.

(v) The statutes and resolutions of the Legislature of the State of Louisiana, the validity of which are involved in this cause, have not yet been

published; but their text is set out verbatim in Appendix D. (Because of its length, Appendix D will be forwarded under separate cover.)

The said statutes and resolutions are: Louisiana Acts 2, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27, and House Concurrent Resolutions 10, 17, 18, 19 and 23 of the First Extraordinary Session of the Louisiana Legislature for 1960.

(c) The following questions are presented by this appeal.

A. The constitutionality of Acts 2, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27 of the First Extraordinary Session of the Louisiana Legislature of 1960.

B. The validity and constitutionality of House Concurrent Resolutions 10, 17, 18, 19 and 23 of the First Extraordinary Session of the Louisiana Legislature of 1960.

C. The validity of the temporary or preliminary injunction restraining the Honorable Jimmie H. Davis, Governor of Louisiana, the Honorable Clarence C. Aycock, Lieutenant Governor of Louisiana, the Honorable Jack P. F. Gremillion, Attorney General of the State of Louisiana, the Legislature of the State of Louisiana, and the individual members thereof, Shelby M. Jackson, State Superintendent of Education, the Orleans Parish School Board, Lloyd J. Rittiner, Louis G. Riecke, Matthew R. Sutherland, Theodore H. Shepard, Jr. and Emile A. Wagner, Jr., the members thereof, James F. Redmond, Superintendent of Schools for the Orleans Parish School Board, A. P. Tugwell, Treasurer of the State of Louisiana, Roy R. Theriot, State Comptroller, The Louisiana State Board of Education and the individual members thereof, Paul B. Habans, Gerald Gallinghouse, David B. Gertler, Edward F. LeBreton, Charles

Deichmann, Risley C. Triche, P. P. Branton, Welborn Jack, Vail Deloney, William Cleveland, E. W. Gravolet, Maj. Gen. Raymond H. Fleming, Adjutant General of Louisiana, Murphy J. Roden, Director of Public Safety of the State of Louisiana, the District Attorneys of all Judicial Districts of Louisiana, as a class, the Criminal Sheriffs of all parishes in Louisiana, as a class, the Mayors of all incorporated municipalities of the State of Louisiana, as a class, the Chiefs of Police of all incorporated municipalities of the State of Louisiana, as a class, and all other persons who are acting or may act in concert with them from enforcing or seeking to enforce by any means the provisions of Acts 2, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27, and House Concurrent Resolutions 10, 17, 18, 19 and 23 of the First Extraordinary Session of the Louisiana Legislature for 1960, and from otherwise interfering in any way with the operation of the public schools for the Parish of Orleans, by the Orleans Parish School Board, pursuant to the orders of the District Court.

D. The validity of all Louisiana statutes which would directly or indirectly require segregation of the races in the public schools or deny them public funds because they are desegregated or interfere with the operation of such schools.

E. The legality of all orders and decisions in the opinion and order of the three-judge Court, dated November 30, 1960, including the denial of Appellants' Motion to Vacate, Modify or Rescind.

(d). On August 27th, 1960, the United States District Court for the Eastern District of Louisiana, New Orleans Division, sitting as a three-judge Court, issued a temporary injunction against Appellants, and the Honorable Jimmie H. Davis, Governor of the State of Louisiana; Honorable Jack P. F. Gremillion, Attorney General

of the State of Louisiana; Honorable A. P. Tugwell, Treasurer of the State of Louisiana, and others, restraining and enjoining them from interfering in any way with the operation of the public schools of the Parish of Orleans by the Orleans Parish School Board. The same judgment declared various acts of the Legislature of the State of Louisiana unconstitutional. (See 187 F. Supp. 42).

On August 30th, 1960, Honorable J. Skelly Wright rendered and signed an order, extending the execution date for the plan of desegregation contained in the Court's Order of May 16, 1960, from the opening of school in September, to Monday, November 14, 1960.

Appellants, in good faith, complied with the Court's orders and initiated a series of steps to accomplish desegregation by November 14. (See detailed allegations in the verified Cross Claim and Third Party Complaint filed by Appellants in the *Bush* case on Sunday, November 13, 1960.).

On October 28, 1960, the Defendant, Jimmie H. Davis, Governor of the State of Louisiana, issued a call, convening the Louisiana Legislature for a twelve-day special session, commencing November 4, 1960. The Legislature convened on said date and subsequently passed a series of acts and resolutions, which acts were signed by the Governor on November 8, 1960; and, since the necessity for the immediate passage thereof had been certified by the Governor to the Legislature, they became effective upon the Governor's approval.

On or about November 7, 1960, the Legislature passed H.C.R. 10, which was received by the Governor, November 8, 1960, at 1:25 PM. H.C.R. 10 creates a Legislative

Committee to consist of five members of the House of Representatives, to be appointed by the Speaker of the House, and three members of the Senate, to be appointed by the President of the Senate, which Committee purports to have full authority to carry out the provisions of Louisiana Act 17. The Legislative Committee was appointed on Wednesday, November 9, and held its first meeting in Baton Rouge on said date. It met again in New Orleans in the offices of the Orleans Parish School Board on Thursday, November 10, and took various actions, which were later ratified by the entire Legislature, which said actions are set forth in full as appendices to H.C.R. 18.

On Thursday, November 10, 1960, the plantiffs in the *Williams* case filed a Supplemental Complaint; and at 3:15 PM, a temporary restraining order was issued by the District Court, restraining Appellants and numerous other state officials from enforcing the provisions of those House Bills, which subsequently became Louisiana Acts 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27, and from otherwise interfering with the operation of the public schools for the Parish of Orleans by the Orleans Parish School Board, pending a hearing on plaintiffs' motion for a preliminary injunction. This same supplemental complaint added additional parties defendant in the *Williams* case.

On the same day, November 10, 1960, the United States of America, filed a Complaint against the State of Louisiana, and numerous State officials, alleging the unconstitutionality of Act 2; and a temporary restraining order was issued enjoining and restraining the defendants named therein from enforcing the provisions of Section 6 of said Act.

On Saturday, November 12, 1960, the plaintiffs in

the *Bush* case, filed a supplemental complaint, adding additional parties defendant to the *Bush* case and seeking interlocutory and permanent injunctions, restraining defendants from enforcing or seeking to enforce the provisions of Acts 10 through 14, and 18 through 27. Acts 16 and 17 were apparently inadvertently omitted by number, but are described in the complaint and supported by proper exhibits.[1]

On the night of Saturday, November 12, 1960, a news bulletin reported that the Honorable Shelby M. Jackson, State Superintendent of Education, had requested all Parish Superintendents of Schools in the State of Louisiana, to declare a school holiday, on Monday, November 14th. On Sunday, November 13th, 1960, Appellant, Dr. James F. Redmond, Superintendent of Schools for the Parish of Orleans, received a telegram from Superintendent Jackson, advising him that a State-wide public school holiday had been declared for Monday, November 14, 1960. On motion of the plaintiffs in the *Bush* case, Superintendent Jackson was ordered to show cause why he should not be cited for contempt of court.

On Sunday, November 13th, the Legislature went back into session and passed H.C.R. 17, 18 and 19, which purported to: a) make the Legislature a Committee on the Whole to replace the eight-man Committee (H.C.R. 17); b) ratify action taken by the eight-man Legislative Committee on the previous Wednesday and Thursday; and discharge Appellant, Dr. James F. Redmond, and the At-

[1] The "package" introduced in the Legislature bore House Bill Nos. 1 through 16 and 18 through 30. There was no House Bill 17. Therefore, House Bills 1 through 16 became Acts 1 through 16, and House Bills 18 through 30, became Acts 17 through 29. Eleven of these Acts were not attacked in these consolidated cases. The Acts not attacked were Act 1, which appropriated money to pay for the expenses of the extra session; Acts 3 through 9, which repealed prior acts of the Legislature, which had previously been declared unconstitutional by the District Court; Act 15 which provided for the appointment of an Attorney for the State Sovereignty Commission; and Acts 28 and 29, which deal with segregation in Trade Schools, which type of schools was not before the Court.

torney for the Orleans Parish School Board (H.C.R. 18),[2] and, c) authorize the employment of special Sergeants-at-Arms to carry out the orders of the Legislature and to declare Monday, November 14th, as a school holiday. (H.C.R. 19).

On the night of Sunday, November 13, Appellants filed a Cross Claim and Third Party Complaint in the *Bush* case, and after pointing out the contradictory effect of the orders of the United States District Court and the Acts of the Louisiana Legislature, requested that the orders of said Court issued on May 16, 1960, and amended on August 30, 1960, be vacated, stayed, modified or suspended, and that Appellants be allowed to operate the public schools of the Parish of Orleans on a racially segregated basis. (See Paragraph 22 of the verified Cross Claim and Third Party Complaint) In the alternative, Appellants prayed that if the Court would not vacate, stay, modify or suspend its orders, then in that event, it should declare those House Bills which later became Acts 10 through 14 & 16 through 27, together with H.C.R. 10, 17, 18 and 19 unconstitutional; and, that a temporary restraining order, to be followed by a preliminary and permanent injunction be issued, restraining all defend-

[2] The reason the Legislature vented its spleen against Dr. Redmond, and the Attorney for the Orleans Parish School Board, is explained in the affidavits of Dr. Redmond and the Chief of Police for the City of New Orleans, which were filed as Exhibits below. (See Exhibits OPSB 4 and 5). As can be seen from the aforesaid exhibits, the Chief of Police recommended to Dr. Redmond that, in the interest of public safety, he not divulge the names of the five negro children who were to be integrated, not even to the members of the School Board, until integration had actually taken place. Nevertheless, the eight-man Legislative Committee repeatedly demanded said information from Dr. Redmond on the night of Wednesday, November 9th and again on November 10th, up until the time the District Court issued a restraining order, on the Supplemental Complaint of the Williams plaintiffs. The same information was again demanded of Dr. Redmond on the night of Thursday, November 10th, by Mr. Emile Wagner, the fifth member of the School Board. The information sought was in a sealed envelope in a safe in the Office of the Attorney for the Board, and was not divulged by Dr. Redmond. The withholding of this information was the sole reason for the passage of H.C.R. 18.

ants in the *Bush* case from enforcing, executing or making operative said Acts and Resolutions, and from otherwise interfering with the operation of the public schools for the Parish of Orleans by the Orleans Parish School Board, pursuant to the orders of the District Court. At 9:45 P.M. on Sunday, November 13, the District Court issued the temporary restraining order prayed for as alternative relief, and granted a motion to add the Legislature of the State of Louisiana, and the individual members thereof, together with other State Officials as parties defendant in the *Bush* case.

On Monday, November 14th, Appellants complied with the orders of the District Court and four Negro children entered two previously all-white schools.

On the same day, Monday, November 14th, the Legislature again reconvened and promptly addressed Appellants Rittiner, Riecke, Sutherland and Shepard out of office as members of the Orleans Parish School Board. The "reasonable cause", required by Article IX, Sect. 3 of the Louisiana Constitution of 1921 to support an address out of office, was stated to be the fact that said Board Members continued to exercise the functions and duties of members of the Orleans Parish School Board despite the passage of Louisiana Acts 17 and 25. (H.C.R. 23)

At 10 P.M. on Monday, November 14, 1960, on the Cross Claim of Appellants, Rittiner, Riecke, Sutherland, and Shepard, the District Court issued another temporary restraining order in the *Bush* case, restraining and enjoining all defendants from enforcing, executing, making operative or acting under the authority of House Concurrent Resolution No. 23 and from otherwise interfering with the operation of the public schools for the Par-

ish of Orleans by the Orleans Parish School Board pursuant to the orders of the court and from taking any other action interfering with or circumventing the orders of the Court.

On November 17th Appellants filed a Motion to Vacate in the *Bush* case, again calling the attention of the Court to the fact that it had diligently attempted to comply with the orders of the District Court but found themselves caught and entangled in a legal struggle between the Legislature of the State of Louisiana on the one hand, and the United States Judiciary on the other, and moved the Court to vacate, rescind, and modify its orders previously issued herein on May 16, 1960, as amended, and allow Appellants to operate the public schools of Orleans Parish on the traditionally segregated basis pending a final decision in the *Bush* case as to the sovereignty of the State of Louisiana, as opposed to the sovereignty of the United States of America.

On November 18th, a consolidated hearing was held, before a Three-Judge Court, to hear all of the above matters. Motions to Dismiss were filed by the Attorney General and by the attorneys for the Legislature, the eight-man Legislative Committee, and Mr. Emile Wagner, Jr. (the 5th member of the Orleans Parish School Board). Affidavits and exhibits were offered in evidence, oral arguments were heard and briefs were filed.

Subsequently the three-judge Court rendered the opinion, judgment and Orders, set forth in full in Appendix A and B, hereof.

(e) Not applicable.

(f) Unless this Court is prepared to reverse *Brown vs. Topeka*, and the long line of later decisions predicated thereon, all of the statutes and resolutions hereinabove

referred to are patently unconstitutional and pose no substantial constitutional question. However, the denial by the District Court of Appellants' motion to allow it to continue the operation of segregated schools in the Parish of Orleans, while the State of Louisiana pursues its attempt to assert the supremacy of its sovereignty over the Federal Judiciary, does present questions which are so substantial as to require plenary consideration.

The First Extraordinary Session of the Louisiana Legislature of 1960 was followed on the succeeding day by the Second Extraordinary Session of 1960, which Session was called for a thirty-day period. During the Second Extraordinary Session, another Act was passed by the Legislature, and signed by the Governor on Saturday, December 3. (La. Act 2 of the Second Extraordinary Session). This Act purports to create a new School Board for the Parish of Orleans, whose members are to be appointed by the Governor, pending an election, which Board has nothing but fiscal powers. Despite the opinion of the three-judge Court issued on November 30, 1960, which declared, *inter alia*, La. Act 17 of the First Extraordinary Session to be unconstitutional, this new Act again provides that the administration of public schools in the Parish of Orleans shall be vested in the Legislature of the State of Louisiana pursuant to the various acts passed by it during the First Extraordinary Session, including Act No. 17.

On Monday, December 5th, 1960, the United States of America, appearing in the *Bush* case as Amicus Curiae, in accordance with the order of the District Court issued on November 25 (See Appendix C, pg. 43), filed a petition and obtained a temporary restraining order, restraining and enjoining all defendants in the *Bush* case from enforcing, or attempting to enforce, the provisions of the

aforesaid Louisiana Act 2 of the Second Extraordinary Session.

Furthermore, the Legislature also passed House Concurrent Resolutions 2, 23, and 28 of the Second Extraordinary Session, which warned the Banks of New Orleans of the fact that the Legislature considers actions taken by the Orleans Parish School Board to be invalid and that the banks will be held accountable for any funds which they allow to be withdrawn from accounts in the name of the Orleans Parish School Board, and even ordered the banks to transfer the balance in said accounts to an account styled: "Legislature School Fund No. 1."

As a result of all of the aforesaid actions of the Legislature, the banks are justifiably afraid to honor checks drawn by Appellants, even though some Seven Hundred Twenty-Eight Thousand ($728,000.00) Dollars is on deposit in said banks to the credit of the School Board. The City of New Orleans, which collects the School Board's local ad valorem taxes, and which is directed by the Louisiana Constitution (Article XII, Section 16), to pay daily to the School Board, the money which it collects for it, is also justifiably afraid to release to Appellants the school taxes, which it has collected, and is collecting. Consequently, Appellants have had to file another Cross Claim and Third Party Complaint, seeking further injunctive relief, in the *Bush* case.

The hearing on the motions for a preliminary injunction in both of the above mentioned proceedings is docketed for December 16th, 1960.

The important fact resulting from the above recitation is, that so long as there is a cloud upon the legal existence of the Orleans Parish School Board, and upon its ability to levy taxes, to borrow money and to pledge its

tax revenues as security of the repayment thereof, banking institutions are reluctant, and thus far have refused, to extend credit to Appellants, as has been routine in the past. Obviously, without adequate financing, Appellants will be unable to comply with the orders of the District Court, which orders have been consistently approved by this Court.

Appellants can apply for, and the District Court can issue, temporary restraining orders as fast as the Legislature passes unconstitutional statutes and resolutions. However, the time element involved in perfecting appeals makes it impossible for this Court to issue final, authoritative judgments with the same rapidity. Therefore, if the Legislature continues its publicly announced course, of continuing to thwart the efforts of Appellants to make adequate financial arrangements, it will shortly become impossible to continue public education in the Parish of Orleans, or to comply with the Orders rendered in the *Bush* case.

It is respectfully submitted that, for the above and foregoing reasons, the questions presented are so substantial as to require plenary consideration by this Court.

(g) If the District Court would either vacate, modify, rescind or suspend its order issued May 16, 1960, as amended on August 30th, 1960, ordering desegregation of the public schools in the Parish of Orleans, no later than November 14, 1960, and allow Appellants to operate the public schools in the City of New Orleans on their traditionally segregated basis, many, if not all, of the problems hereinabove recited would be solved. As an administrative agency of the State of Louisiana, the primary function and concern of Appellants is to operate the public school system of the Parish of Orleans. While the State urges and prosecutes its claim to sovereignty

in the field of Public Education, and while the issues presented thereby are being litigated, it would be manifestly in the public interest to remove the public schools of the City of New Orleans from the battleground. If this is not done, Appellants are fearful that the battle scars which must inevitably be inflicted, will be so deep and so serious that it will take at least fifty years to eradicate same.

Appellants accordingly pray that this Court enter an order noting jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Robert G. Polack, one of the attorneys for Orleans Parish School Board, Lloyd J. Rittiner, Louis G. Riecke, Matthew R. Sutherland, Theodore H. Shepard, Jr., and Dr. James F. Redmond, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the day of December 1960, I served copies of the foregoing Jurisdictional Statement on the several parties hereto, by mailing a copy in a duly addressed envelope, with postage prepaid (airmail postage, where indicated) to the following:

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 3630
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RIVES, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges:

Called into extraordinary session for November 4,

1960, just ten days before the day fixed by this court for the partial desegregation of the New Orleans public schools,[1] the Louisiana Legislature promptly enacted 27

[1] The Orleans Parish school desegregation controversy has been in the federal courts for eight years. Since the decision in *Brown* v. *Board of Education*, 347 U.S. 483, in 1954, it has been clear that under the Constitution of the United States segregation in the public schools of Louisiana cannot lawfully continue, and that all state laws in conflict with the *Brown* holding are null and void. Repeatedly, however, the state legislature has enacted legislation designed to circumvent the law of the land and to perpetuate segregation in the schools of Louisiana.

In 1954, the state adopted a constitutional amendment and two segregation statutes. The amendment and Act 555 purported to re-establish the existing state law requiring segregated schools. Act 556 provided for assignment of pupils by the school superintendent. On February 15, 1956, this court held that both the amendment and the two statutes were invalid. The court issued a decree enjoining the School Board, "its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order" from requiring and permitting segregation in the New Orleans schools. *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, 337, 342, aff'd, 242 F.2d 156, cert. denied, 354 U.S. 921.

Not only was there no compliance with that order, but immediately thereafter the legislature produced a new package of laws, in particular Act 319 (1956) which purported to "freeze" the existing racial status of public schools in Orleans Parish and to reserve to the legislature the power of racial reclassification of schools. On July 1, 1956, this court refused to accept the School Board's contention that Act 319 had relieved the Board of its responsibility to obey the desegregation order. In the words of the court, "Any legal artifice, however cleverly contrived, which would circumvent this ruling [of the Supreme Court, in *Brown* v. *Board of Education*, *supra*] and others predicated on it, is unconstitutional on its face. Such an artifice is the statute in suit." *Bush* v. *Orleans Parish School Board*, 163 F. Supp. 701, aff'd, 268 F.2d 78. See also, *Lane* v. *Wilson*, 307 U. S. 268.

Nevertheless, the legislature continued to contrive circumventive artifices.

In 1958 a third group of segregation laws was enacted, including Act 256, which empowered the Governor to close any school under court order to desegregate, as well as any other school in the system. In the first court test of this law it was struck down as unconstitutional by this court on August 27, 1960. *Bush* v. *Orleans Parish School Board*, 187 F.Supp. 42.

On July 15, 1959, the court ordered the New Orleans School Board to present a plan for desegregation, *Bush* v. *Orleans Parish School Board*, No. 3630, but there was no compliance. Therefore, on May 16, 1960, the court itself formulated a plan and ordered desegregation to begin with the first grade level in the fall of 1960.

For the fourth time, in its 1960 session, the legislature produced a packet of segregation measures, this time to prevent compliance with the order of May 16, 1960. Four of these 1960 measures—Acts 333, 495, 496 and 542—and the three earlier acts referred to above—Acts 555 of 1954, Act 319 of 1956, and Act 256 of 1958—were promptly declared unconstitutional by a three-judge court on August 27, 1960, in the combined cases of *Bush* v. *Orleans Parish School Board* and *Williams* v. *Davis*, and their enforcement by "the Honorable Jimmie H. Davis, Governor of the State

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measures[2] designed to halt, or at least forestall, the implementation of the Orleans Parish School Board's announced proposal to admit five Negro girls of first grade age to formerly all-white schools. The first of these, Act 2 of the First Extraordinary Session of 1960,[3] is the so-called "interposition" statute by which Louisiana declares that it will not recognize the Supreme Court's decision in *Brown v. Board of Education*, supra, or the orders of this court issued pursuant to the mandate of that case. Insofar as it provides criminal penalties against federal judges and United States marshals who render or carry out such decisions, the Government, by separate suit consolidated here for hearing, seeks an injunction against the Act. The next seven Acts, Nos. 3 through 9, merely repeal statutes earlier ruled on by this court and enjoined as unconstitutional.[4]

The remaining seventeen Acts, numbered 10 through 27, are here assailed on constitutional grounds and a temporary injunction against their enforcement is prayed for by the Plaintiffs, parents of white school children, in the *Williams* case. Among these are measures purporting to abolish the Orleans Parish School Board and transfer its function to the Legislature. On November 10, 1960, restraining orders were directed to the appropriate state officers enjoining them from enforcing the provisions of all but one of the statutes pending hearing before this court. Nevertheless, apparently still considering itself the administrator of the New Orleans public

[1] Continued
of Louisiana, and all those persons acting in concert with him, or at his direction, including the defendant, James F. Redmond," was enjoined. *Bush v. Orleans Parish School Board*, 187 F.Supp. 42, 45. At the same time, the effective date of the desegregation order was postponed to November 14, 1960.

[2] An analysis of the 27 Acts, minus Act 2, and House Concurrent Resolutions 10, 17, 18, 19 and 23 forms Appendix B to this opinion.

[3] The full text of Act 2 forms Appendix A to this opinion.

[4] See Note 1.

schools, the Louisiana Legislature has continued to act in that capacity, issuing its directives by means of concurrent resolutions. House Concurrent Resolutions Nos. 17, 18 and 19. On November 13th, when the enforcement of these resolutions was also restrained on motion of the School Board, the Legislature retaliated by addressing all but one member of the Board out of office. House Concurrent Resolution No. 23. This action by the Legislature also was the subject of an immediate temporary restraining order. As cross-claimant in the *Bush* case, the original school case filed by parents of Negro children, the School Board now asks for a temporary injunction against these most recent measures. Finally, the court has before it a motion by the School Board to vacate or stay its order fixing November 14, 1960, as the date for the partial desegregation of the local schools.

Jurisdiction

In view of the fact that one of the actions involved has been pending for more than eight years and that several judgments have already been rendered in the proceeding both here and on appeal,[5] it would seem somewhat late in the day to raise jurisdictional issues. But, in view of the elaborate arguments pressed upon us we have re-examined the matter.

Pretermitting the question of jurisdiction under 28 U.S.C. Sec. 1331, it is, of course, plain that jurisdiction of the claims in the *Bush* and *Williams* cases is vested by the provisions of 28 U.S.C. Sec. 1343 (3) and of the suit of the United States by 28 U.S.C. Sec. 1345, and that, since in all three matters an injunction is sought against the enforcement of state laws by officers of the state, a court of three judges was properly convened under 28 U.S.C. Sec. 2281.

[5] See Note 1.

Insofar as it is denied that the measures under attack work a "deprivation * * * of any right * * * secured by the Constitution of the United States," that is a question addressed to the merits. For jurisdictional purposes it suffices that a substantial claim of deprivation has been made. Likewise, the "interposition" defense cannot affect the initial jurisdiction of the court, for it must at least take jurisdiction to determine whether the state act purporting to insulate Louisiana from the force of federal law in the field of public education is constitutionally valid. If the statute is not valid, obviously it can have no effect on the court's jurisdiction. The Eleventh Amendment argument, made again here, has already been fully answered on a prior appeal in the *Bush* case. See 242 F. 2d 156. Of course, the Eleventh Amendment has no application to the suit of the United States.

Finally, there is no merit in the claim of "legislative immunity" put forward on behalf of the committee of the Legislature and its members who are sought to be enjoined from enforcing the measures which grant them control of the New Orleans public schools. The argument is specious. There is no effort to restrain the Louisiana Legislature as a whole, or any individual legislator, in the performance of a **legislative** function. It is only insofar as the lawmakers purport to act as **administrators** of the local schools that they, as well as all others concerned, are sought to be restrained from implementing measures which are alleged to violate the Constitution. Having found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution. Normally, these are officers of the executive branch, but when the legislature itself seeks to act as executor of its own laws, then, quite obviously, it is no longer legislating and is no more

immune from process than the administrative officials it supersedes. As Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing [an injunction] is to be determined."

Interposition

Except for an appropriation measure to provide for the cost of the special session, the very first statute enacted by the Louisiana Legislature at this Extraordinary Session was the interposition act. That was appropriate because it is this declaration which sets the tone and gives substance to all the subsequent legislation. For the most part, the measures that followed merely implement the resolve announced in the interposition act to "maintain racially separate public school facilities * * * when such facilities are in the best interest of their citizens," notwithstanding "the decisions of the Federal District Courts in the State of Louisiana, prohibiting the maintenance of separate schools for whites and negroes and ordering said schools to be racially integrated," which decisions, being "based solely and entirely on the pronouncements of Brown vs. Topeka Board of Education," are "null, void and of no effect as to the State of Louisiana." Significantly, the Attorney General, appearing for the State and most of its officers, rested his sole defense on this act. Without question, the nub of the controversy is in the declaration of interposition. If it suceeds, there is no occasion to look further, for the state is then free to do as it will in the field of public education. On the other hand, should it fail, nothing can save the "package" of segregation measures to which it is tied.

Interposition is an amorphous concept based on the proposition that the United States is a compact of states, any one of which may interpose its sovereignty against the enforcement within its borders of any decision of the Supreme Court or act of Congress, irrespective of the fact that the constitutionality of the act has been established by decision of the Supreme Court. Once interposed, the law or decision would then have to await approval by constitutional amendment before enforcement within the interposing state. In essence, the doctrine denies the constitutional obligation of the states to respect those decisions of the Supreme Court with which they do not agree.[6] The doctrine may have had some validity under the Articles of Confederation. On their failure, however, "in order to form a more perfect union," the **people**, not the states, of this country ordained and established the Constitution. *Martin v. Hunter*, 14 U.S. (1 Wheat.) 304, 324. Thus the keystone of the interposition thesis, that the United States is a compact of states, was

[6] The short answer to interposition may be found in *Cooper* v. *Aaron*, 358 U.S. 1, 17-18. In view of the apparent seriousness with which the State of Louisiana makes the point, however, we will labor it. In *Cooper* v. *Aaron*, the Supreme Court stated:

> "***We should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.
>
> "Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803 Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation', declared in the notable case of *Marbury* v. *Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution'." *Cooper* v. *Aaron*, supra.

disavowed in the Preamble to the Constitution.

Nevertheless, throughout the early history of this country, the standard of interposition was raised whenever a state strongly disapproved of some action of the central government. Perhaps the most precise formulation of the doctrine can be found in the Virginia and Kentucky interposition resolutions against the Alien and Sedition Acts. Jefferson was the reluctant author of the Kentucky resolution, while Madison wrote Virginia's. Jefferson was not proud of his work for he never admitted authorship. And Madison, after publicly espousing the cause of interposition for a short time, spent much of his energy combatting the doctrine and finally admitted its bankruptcy in these words:

> "The jurisdiction claimed for the Federal Judiciary is truly the only defensive armor of the Federal Government, or rather for the Constitution and laws of the United States. Strip it of that armor, and the door is wide open for nullification, anarchy and convulsion, * * * " Letter, April 1, 1833,

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[7] Of course, even the "compact theory" does not justify interposition. Thus, Edward Livingston, Louisiana's noted lawgiver, though an adherent of that theory, strongly denied the right of a state to nullify federal law or the decisions of the federal courts. While representing Louisiana in the United States Senate and participating in its debates in January, 1830, he stated his view "That, by the institution of this government, the states have unequivocally surrendered every constitutional right of impeding or resisting the execution of any decree or judgment of the Supreme Court, in any case of law or equity between persons or on matters, of whom or on which that court has jurisdiction, *even if such a decree or judgment should, in the opinion of the states, be unconstitutional;*" "That the alleged right of a state to put a veto on the execution of a law of the United States, which such state may declare to be unconstitutional, attended (as, if it exist, it must be) with the correlative obligation, on the part of the general government, to refrain from executing it; and the further alleged obligation, on the part of that government, to submit the question to the states, by proposing amendments, are not given by the Constitution, nor do they grow out of the reserved powers;" "That the introduction of this feature in our government would totally change its nature, make it inefficient, invite to dissension, and end, at no distant period, in separation; and that, if it had been proposed in the form of an explcit provision in the Constitution, it would have been unanimously rejected, both in the Convention which framed that instrument and in those which adopted it." Quoted in 4 Elliot's Debates 519-520. (Emphasis Added)

quoted in 1 Warren, The Supreme Court in United States History (Revised Ed. 1926), 740.

While there have been many cases which treat of segmented facets of the interposition doctrine, in only one is the issue squarely presented. In *United States v. Peters*, 9 U.S. (5 Cranch) 115, the legislature of Pennsylvania interposed the sovereignty of that state against a decree of the United States District Court sitting in Pennsylvania. After much litigation,[*] Chief Justice Marshall finally laid the doctrine to rest thusly:

> "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves." *United States v. Peters*, supra, 136.

Interposition theorists concede the validity, under the supremacy clause, of acts of Congress and decisions of the Supreme Court except in the area reserved for the states by the Tenth Amendment. But laws and decisions in this reserved area, the argument runs, are by definition **unconstitutional,** hence are not governed by the supremacy clause and do not rightly command obedience. This, of course, is Louisiana's position with reference to the *Brown* decision in the recent Act of Interposition. Quite obviously, as an inferior court, we cannot overrule

[*] For a detailed statement of the case, its background and aftermath, see the address by Mr. Justice Douglas reprinted at 19 F.R.D. 185 and 9 Stan. L.Rev. 3.

that decision. The issue before us is whether the Legislature of Louisiana may do so.

Assuming always that the claim of interposition is an appeal to legality, the inquiry is who, under the Constitution, has the final say on questions of constitutionality, who delimits the Tenth Amendment. In theory, the issue might have been resolved in several ways. But, as a practical matter, under our federal system the only solution short of anarchy was to assign the function to **one supreme court.** That the final decision should rest with the judiciary rather than the legislature was inherent in the concept of constitutional government in which legislative acts are subordinate to the paramount organic law, and, if only to avoid "a hydra in government from which nothing but contradiction and confusion can proceed," final authority had to be centralized in a single national court. *The Federalist*, Nos. 78, 80, 81, 82. As Madison said before the adoption of the Constitution: "Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated." *The Federalist*, No. 39.

And so, from the beginning, it was decided that the Supreme Court of the United States must be the final arbiter on questions of constitutionality. It is of course the guardian of the Constitution against encroachments by the national Congress. *Marbury v. Madison*, supra.

It is interesting to note that even Calhoun, whose writings, in addition to those of Madison, are now invoked by Louisiana, did not pretend that the *legislature* of the state had a right to interpose, but held that a popular *convention* within the state was the proper medium for asserting state sovereignty. See his "Fort Hill Letter" of August 28, 1832, quoted in pertinent part in Miller and Howell, "Interposition, Nullification and the Delicate Division of Power in a Federal System," 5 J. Pub. L. 2, 31.

But more important to our discussion is the constitutional role of the Court with regard to State acts. The original Judiciary Act of 1789 confirmed the authority of the Supreme Court to review the judgments of all state tribunals on constitutional questions. Act of Sept. 24, 1789, §25; 1 Stat. 73, 85. See *Martin v. Hunter*, supra; *Worcester v. Georgia*, 31 U.S. (6 Peters) 515; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264; *Ableman v. Booth*, 62 U.S. (21 Row.) 506. Likewise from the first one of its functions was to pass on the constitutionality of state laws. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316. And the duty of the Court with regard to the acts of the state executive is no different. *Sterling v. Constantin*, 287 U.S. 378; *Cooper v. Aaron*, 358 U.S. 1. The fact is that the Constitution itself established the Supreme Court of the United States as the final tribunal for constitutional adjudication. By definition, there can be no appeal from its decisions.

The initial conclusion is obvious enough. Plainly, the states, whose proceedings are subject to revision by the Supreme Court, can no more pretend to review that Court's decision on constitutional questions than an inferior can dispute the ruling of an appellate court. From this alone "it follows that the interpretation of the Fourteenth Amendment enunciated by [the Supreme] Court in the *Brown* case is the supreme law of the land, and [that] Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Cooper v. Aaron*, supra, 18.

But this is not all. From the fact that the Supreme Court of the United States rather than any state authority is the ultimate judge of constitutionality, another

consequence of equal importance results. It is that the jurisdiction of the **lower** federal courts and the correctness of their decisions on constitutional questions cannot be reviewed by the state governments. Indeed, since the appeal from their rulings lies to the Supreme Court of the United States, as the only authoritative Constitutional tribunal, neither the executive, nor the legislature, nor even the courts of the state, have any competence in the matter. It necessarily follows that, pending review by the Supreme Court, the decisions of the subordinate federal courts on constitutional questions have the authority of the supreme law of the land and must be obeyed. Assuredly, this is a great power, but a necessary one. See *United States v. Peters*, supra, 135, 136.

Apprehensive of the validity of the proposition that the Constitution is a compact of states, interposition asserts that at least a ruling challenged by a state should be suspended until the people can ratify it by constitutional amendment. But this invocation of "constitutional processes" is a patent subterfuge. Unlike open nullification, it is defiance hiding under the cloak of apparent legitimacy. The obvious flaw in the argument lies in the unfounded insistence that **pending a vote on the proposed amendment** the questioned decision must be voided. Even assuming their good faith in proposing an amendment against themselves, the interpositionists want too much. Without any semblance of legality, they claim the right at least temporarily to annul the judgment of the highest court, and, should they succeed in defeating the amendment proposed, they presume to interpret that victory as voiding forever the challenged decision. It requires no elaborate demonstration to show that this is a preposterous perversion of Article V of the Constitution. Certainly the Constitution can be amended "to overrule"

the Supreme Court. But there is nothing in Article V that justifies the presumption that what has authoritatively been declared to be the law ceases to be the law while the amendment is pending, or that the non-ratification of an amendment alters the Constitution or any decisions rendered under it.[10]

The conclusion is clear that interposition is not a **constitutional** doctrine. If taken seriously, it is illegal defiance of constitutional authority. Otherwise, "it amounts to no more than a protest, an escape valve through which the legislatures blow off steam to relieve their tensions." *Shuttlesworth v. Birmingham Board of Education*, N.D. Ala., 162 F. Supp. 372, 381. However solemn or spirited, interposition resolutions have no legal efficacy. Such, in substance, is the official view of Virginia, delivered by its present Governor while Attorney General.[11] And there is a general tacit agreement among

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[10] Madison also had occasion to comment on this modified interposition: "***We have seen the absurdity of such a claim in its naked and suicidal form! Let us turn to it as modified by South Carolina, into a right of every State to resist within itself the execution of a Federal law deemed by it to be unconstitutional, and to demand a convention of the States to decide the question of constitutionality; the annulment of the law to continue in the meantime, and to be permanent unless three-fourths of the States concur in overruling the annulment.

"Thus, during the temporary nullification of the law, the results would be the same from (as?) those proceeding from an unqualified nullification, and the result of the convention might be that seven out of twenty-four States might make the temporary results permanent. It follows, that any State which could obtain the concurrence of six others might abrogate any law of the United States, constructively, whatever, and give to the Constitution any shape they please, in opposition to the construction and will of the other seventeen, each of the seventeen having an equal right and authority with each of the seven. Every feature in the Constitution might thus be successively changed; and after a scene of unexampled confusion and distraction, what has been unanimously agreed to as a whole, would not, as a whole, be agreed to by a single party. The amount of this modified right of nullification is, that a single State may arrest the operation of a law of the United States, and institute a process which is to terminate in the ascendancy of a minority over a large majority in a republican system, the characteristic rule of which is, that the major will is the ruling will,***" Madison, On Nullification (1835-1836), in IV Letters and Other Writings of James Madison (Congress ed. 1865), 409.

[11] See the Opinion of Attorney General Almond rendered February 14, 1956, in 1 Race Rel. L. Rep. 462.

the other interposing states [12] which is amply reflected in their failure even to raise the argument in the recent litigation, the outcome of which they so much deplore. Indeed, Louisiana herself has had an "interposition" resolution on the books since 1956,[13] and has never brought it forth. The enactment of the resolution in statutory form does not change its substance. Act 2 of the First Extraordinary Session of 1960 is not legislation in the true sense. It neither requires nor denies. It is mere statement of principles, a political polemic, which provides the predicate for the second segregation package of 1960, the legislation in suit. Its unconstitutional premise strikes with nullity all that it would support.

The Other Legislation

Without the support of the Interposition Act, the rest of the segregation "package" falls of its own weight. However ingeniously worded some of the statutes may be, admittedly the sole object of every measure adopted at the recent special session of the Louisiana Legislature is to preserve a system of segregated public schools in defiance of the mandate of the Supreme Court in *Brown* and the orders of this court in *Bush*. What is more, these acts were not independent attempts by individual legislators to accomplish this end. The whole of the legislation, sponsored by the same select committee, forms a single scheme, all parts of which are carefully interrelated. The proponents of the "package" were themselves insistent on so labelling it, and expressly argued that the passage of

[12] Interposition declarations have been adopted in Alabama, Act 42 of Spec. Sess. 1956; Georgia, H. Res. 185 of 1956; Mississippi, Sen. Conc. Res. 125 of 1956; South Carolina, Act of Feb. 14, 1956; Virginia, Sen. Joint Res. 3 of 1956; Tennessee, H. Res. 1 and 9 of 1957; and Florida Sen. Conc. Res. 17-XX of Spec. Sess. 1956, and H. Conc. Res. 174 of 1957. For text of these acts and resolutions, see 1 Race Rel. L.Rep. 437, 438, 440, 445, 445, 948; 2 id. 228,481, 707.

[13] H.Conc. Res. 10 of 1956. The text of the Resolution is reproduced in 1 Race Rel. L. Rep. 753.

every measure proposed was essential to the success of the plan. In view of this, the court might properly void the entire bundle of new laws without detailed examination of its content. For, as the Supreme Court said in *Cooper v. Aaron*, *supra*, 7, "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" But we shall nevertheless give brief consideration to each of the measures enacted.

Re-Enactment of Statutes Previously Declared Unconstitutional

Five of the new statutes merely re-enact laws already voided by this court on August 27, 1960. *Bush v. Orleans Parish School Board*, 187 F. Supp. 42. Act 10 of the recent session is, except for the most minor stylistic changes, a verbatim copy of Act 542 of 1960 [14] which required the Governor to close any school threatened with "disorder, riots or violence." We said of that law that "its purpose speaks louder than its words." The same is true of the present statute. It can fare no better.

Likewise, Acts 11, 12, 13 and 14; all in effect school closure measures, are, except in one particular, carbon copies of statutes held invalid by the decision rendered August 27.[15] The only difference, common to all four acts,

[14] Former La. R.S. 17:170, repealed by Act. 4 of 1st Extra.Sess. 1960.

[15] Act 11 is a re-enactment of Act 256 of 1958, former La. R.S. 17:336, repealed by Act 7, 1st Extra. Sess. 1960, which authorized the Governor to close any school under a court order to integrate.

Act 12 is a re-enactment of Act 495 of 1960, former La. R.S. 17:348.1-348.7, repealed by Act 6, 1st Extra. Sess. 1960, which provided that whenever the Governor had taken over control of any school because it was

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is the deletion of references to "segregation", "integration" or "separate facilities" in the earlier statutes and the substitution of the words "consistent with the Constitution and laws of this State or State Board of Education policies, rules or regulations." But this euphemism cannot save the legislation. Indeed, the Interposition Act itself makes it clear enough that the policy of the state is to maintain segregation in public education despite the mandate of the Supreme Court and the orders of this court. And other state laws, still unchallenged, expressly promote separation of the races in public schools.[16]

The New General Measures

In addition to the re-enacted statutes and the acts aimed specifically at the New Orleans School Board, a group of carefully interlocking measures was adopted at the recent Legislature. The pattern worked out is as follows: In order to forestall any effective integration order for this school year, present enrollment on a segregated basis is "frozen" and transfers are forbidden (Act 26); but, for the future, any school under an order to desegregate is immediately closed (Act 22), whereupon the local school board ceases to exist (Act 21); to carry out these

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[15] Continued
under an order to integrate he might close all the public schools of the state.

Act 13 is a re-enactment of Act 333 of 1960, former La. R.S. 17:337, repealed by Act 8, 1st Extra. Sess. 1960, which prohibited the furnishing of school books, supplies or funds to any integrated school.

Act 14 is a re-enactment of Act 555 of 1954, former La. R.S. 17:331-334, which required segregation in public schools as an exericse of the state's police power. Act 555 was first declared unconstitutional in *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, aff'd, 5 Cir., 242 F. 2d 156. It was again invalidated by this court on August 27, 1960. 187 F. Supp. 42.

[16] See, e.g., La. R.S. 17:391.1-391.16, in which "The legislature of Louisiana recognizes and hereby affirms * * * that no child will be forced to attend a school with children of another race in order to get an education," and provides for grants to the white children of an integrated school; and La. R.S. 17:462, 493, and 523, which penalize teachers, school bus operators and other school employees who advocate or assist in bringing about integration.

directives, by force if necessary, the state police are given additional powers and placed under the orders of the Legislature (Act 16), and if demonstrators are needed, they may now be recruited among the students who are no longer compelled to go to school (Act 27); to assure that an integrated school does close, the new legislation provides that if it continues to operate it shall enjoy no accreditation (Act 20), teachers shall lose their certification (Act 23), and the students themselves shall receive no promotion or graduation credits (Act 24). A mere recitation of the scheme suffices. No one dare contest the sole purpose of all this legislation is to defeat the constitutional right of colored children to attend desegregated schools. Since such is their purpose, they are all unconstitutional. *Gomillion v. Lightfoot*, Supreme Court, 31/14 60; *Cooper v. Aaron*, *supra*, 17; *Brown v. Board of Education*, *supra*; *Lane v. Wilson*, *supra*; 275.

Measures Relating to the Orleans Parish School Board

Finally, there is a series of measures which purport to abolish the Orleans Parish School Board, culminating, somewhat inconsistently, in the Resolution which "addresses out of office" four of the five members of that Board. In defense of these actions, it is said that they concern only the internal political affairs of the state which, within the framework of local law, the legislature may conduct as it sees fit, and which, accordingly, are none of this court's business. With special emphasis, it is argued that the exercise by a state legislature of its right to withdraw powers previously delegated by it to an inferior political body of its own creation presents no federal question, constitutional or otherwise, and, in the absence of diversity of citizenship, is not reviewable by a federal court. On the other hand, plaintiffs assert that these measures, however innocent on their face, were spe-

cifically designed to deprive them of their constitutional rights, and that allegation, which was neither contradicted nor qualified, is supported by the facts. Indeed, Acts 17, 18 and 25 which purport to abolish the New Orleans School Board were part and parcel of the original "segregation package" introduced on the first day of the special session of the Legislature, House Concurrent Resolutions 10, 17, 18 and 19 expressly implemented the earlier statutes,[17] and House Concurrent Resolution No. 23 explicitly states that the School Board members were removed from office for failing to abandon their duties in compliance with the Acts and Resolutions just enumerated.

As to these measures, then, we are admittedly in an area peculiarly reserved for exclusive state action. But, just as clearly, we know that the sole object of the legislation is to deprive colored citizens of a right conferred upon them by the Constitution of the United States. The question is whether the protective arm of the Constitution reaches into the "inner sanctum" where the state conducts what it considers its strictly private business. The answer is eloquently stated in *Gomillion v. Lightfoot*, decided by the Supreme Court November 14, 1960. There, in holding an act of a state legislature redefining municipal boundaries so as to exclude Negro citizens clearly unconstitutional, the Court stated:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not

[17] Resolution No. 10 delegated to an eight-man legislative committee full control over the New Orleans Schools; No. 17 re-transferred that control to the Legislature as a whole, converting the committee into an investigative body with subpoena powers; in No. 18, the Legislature, acting as administrator of the New Orleans schools, purports to fire the local superintendent of schools and the School Board's attorney; and No. 19 declared a school holiday for November 14, the date fixed for the desegregation of first grade classes in New Orleans, and directed the sergeants-at-arms of the Legislature to enforce the holiday.

carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, *viz.*, that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.' *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114. * * * "

Motion to Vacate

The last matter presented for our consideration is the School Board's plea that we postpone the effective date of the order compelling desegregation of first grade classes by November 14. The Board suggests that local conditions are so disturbed that orderly compliance is difficult at this time, especially in view of its own precarious legal and financial position. All this may be true, but the history of this litigation leaves some doubt about the advisability of further postponing an inevitable deadline. Indeed, the date originally set for making a start in the direction of desegregation has already been postponed two months and it is far from clear that this delay improved conditions. But, in any event, though we be persuaded of the School Board's good faith, there can be no question of delaying still longer the enjoyment of a constitutional right which was solemnly pronounced by the Supreme Court of the United States more than six years ago. As that Court itself said in rejecting a similar plea in Cooper v. Aaron, supra, 15-16:

"One may well sympathize with the position

of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for these conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

"The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan v. Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action."

CONCLUSION

For the foregoing reasons, this court denies the interposition claim of the State of Louisiana and declares Acts 2, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 and House Concurrent Resolutions 10, 17, 18, 19 and 23 of the First Extraordinary Session of 1960 unconstitutional. This court will prepare the decree enjoining their enforcement. The motions to dismiss are denied. The motion to vacate, or delay the effective date of, the order requiring desegregation of the New Orleans public schools is likewise denied.

/s/ RICHARD T. RIVES
RICHARD T. RIVES, Chief Judge
United States Court of Appeals

(Signed) HERBERT W. CHRISTENBERRY
HERBERT W. CHRISTENBERRY, Chief Judge
United States District Court

(SIGNED) J. SKELLY WRIGHT
J. SKELLY WRIGHT, Judge
United States District Court

New Orleans, Louisiana
Nov. 30, 1960

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 10566
CIVIL ACTION

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, ET AL

NO. 3630
CIVIL ACTION

EARL BENJAMIN BUSH, ET AL

versus

ORLEANS PARISH SCHOOL BOARD, ET AL

NO. 10329
CIVIL ACTION

HARRY K. WILLIAMS, ET AL

versus

JIMMIE H. DAVIS, ET AL

TEMPORARY INJUNCTION

These cases came on for hearing on motions for temporary injunction, restraining the enforcement of certain acts and resolutions of the First Extraordinary Session of the Louisiana Legislature for the year 1960.

It being the opinion of this Court that all Louisiana statutes which would directly or indirectly require segre-

gation of the races in the public schools, or deny them public funds because they are desegregated, or interfere with the operation of such schools, pursuant to the Orders of this Court, by the Orleans Parish School Board, are unconstitutional, in particular, Acts 2, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27, and House Concurrent Resolutions 10, 17, 18, 19 and 23;

IT IS ORDERED that the Honorable Jimmie H. Davis, Governor of Louisiana, the Honorable Clarence C. Aycock, Lieutenant Governor of Louisiana, the Honorable Jack P. F. Gremillion, Attorney General of the State of Louisiana, the Legislature of the State of Louisiana, and the individual members thereof, Shelby M. Jackson, State Superintendent of Education, the Orleans Parish School Board, Lloyd J. Rittiner, Louis G. Riecke, Matthew R. Sutherland, Theodore H. Shepard and Emile A. Wagner, Jr., the members thereof, James F. Redmond, Superintendant of Schools for the Orleans Parish School Board, A. P. Tugwell, Treasurer of the State of Louisiana, Roy R. Theriot, State Comptroller, The Louisiana State Board of Education and the individual members thereof, Paul B. Habans, Gerald Gallinghouse, David B. Gertler, Edward F. LeBreton, Charles Deichmann, Risley C. Triche, P. P. Branton, Welborn Jack, Vail Deloney, William Cleveland, E. W. Gravolet, Maj. Gen. Raymond H. Fleming, Adjudant General of Louisiana, Murphy J. Roden, Director of Public Safety of the State of Louisiana, the District Attorneys of all Judicial districts of Louisiana, as a class, the Criminal Sheriffs of all parishes in Louisiana, as a class, the Mayors of all incorporated municipalities of the State of Louisiana, as a class, the Chiefs of Police of all incorporated municipalities of the State of Louisiana, as a class, and all other persons who are acting or may act in concert with them, be, and they are hereby restrained,

enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Acts 2, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27, and House Concurrent Resolutions 10, 17, 18, 19 and 23 of the First Extraordinary Session of the Louisiana Legislature for 1960, and from otherwise interfering in any way with the operation of the public schools for the Parish of Orleans by the Orleans Parish School Board, pursuant to the Orders of this Court.

IT IS FURTHER ORDERED that copies of this temporary injunction shall be served forthwith upon each of the defendants named herein.

IT IS FURTHER ORDERED that a copy of this temporary injunction shall be served forthwith on The Louisiana Sovereignty Commission, through its chairman.

An injunction bond in the sum of ~~$100.00 shall be~~ filed herein.

s/ RICHARD T. RIVES
UNITED STATES CIRCUIT JUDGE

(Signed) HERBERT W. CHRISTENBERRY
UNITED STATES DISTRICT JUDGE

(SIGNED) J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

Issued November 30, 1960,
at New Orleans, Louisiana

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 3630
CIVIL ACTION

EARL BENJAMIN BUSH, ET AL,
Plaintiffs,

versus

ORLEANS PARISH SCHOOL BOARD, ET AL,
Defendants.

NO. 10329
CIVIL ACTION

HARRY K. WILLIAMS, ET AL,
Plaintiffs,

versus

JIMMIE H. DAVIS, Governor of the
State of Louisiana, ET AL,
Defendants.

ORDER DESIGNATING UNITED STATES OF AMERICA AS AMICUS CURIAE

It appearing from the verified supplemental complaint of the plaintiffs in *Bush, et al v. Orleans Parish School Board, et al*, from the verified cross complaint and third party claim of the defendants in *Bush, et al v. Orleans Parish School Board, et al*, and from the verified complaint and supplemental complaint of the plaintiffs in *Williams, et al v. Davis, et al*, that the defendants in

Bush, et al v. Orleans Parish School Board, et al have been interfered with, obstructed and impeded in carrying out the orders of this court made and entered on May 16 and August 30, 1960, in *Bush, et al v. Orleans Parish School Board, et al*, and

The defendants in *Bush, et al v. Orleans Parish School Board, et al* having strenuously urged to this court in their Motion to Vacate, filed November 17, 1960, that they, "interested solely in the education of the children of this parish, find themselves caught and entangled in a legal struggle between the Legislature of the State of Louisiana on the one hand, and the United States Judiciary on the other" and that the "resolution of the current battle between the State Legislature and the Federal Judiciary is far beyond the powers given to the Orleans Parish School Board," and

The court being of the opinion that the public interest in the administration of justice should be represented in these proceedings and that it will be of assistance to the court to have the benefit of the views of counsel for the United States as *amicus c riae*, and this court being entitled at any time to call upon the law officers of the United States to serve in that capacity, now, therefore,

IT IS ORDERED that the United States is hereby requested and authorized to appear in these proceedings as *amicus curiae*, by and through the Attorney General of the United States and the United States Attorney for the Eastern District of Louisiana, to accord the court the benefit of its views and recommendations with the right to submit to the court pleadings, evidence, arguments and briefs, and to initiate such further proceedings as may be appropriate, in order to maintain and preserve the

due administration of justice and the integrity of the judicial processes of the United States.

RICHARD T. RIVES, Chief Judge
United States Court of Appeals

(Signed) HERBERT W. CHRISTENBERRY
HERBERT W. CHRISTENBERRY, Chief
Judge United States District Court

Signed J. SKELLY WRIGHT
J. SKELLY WRIGHT, Judge
United States District Court

November 25th, 1960
Entered December 2, 1960

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JAMES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 589

ORLEANS PARISH SCHOOL BOARD, *et al.*,

Appellants,

—v.—

EARL BENJAMIN BUSH, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

MOTION TO AFFIRM

A. P. TUREAUD
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ELWOOD H. CHISOLM
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 589

ORLEANS PARISH SCHOOL BOARD, *et al.*,

Appellants,

—v.—

EARL BENJAMIN BUSH, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

MOTION TO AFFIRM

Appellees move to affirm the judgment below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Questions Presented

For the purposes of this motion, appellees adopt the questions presented by appellants at pages 3-4 of their Jurisdictional Statement.

Statement of the Case

The complete history of this protracted litigation, including a full statement of the proceedings giving rise to

this appeal, is set out in the opinion of the court below. See Appellants' Jurisdictional Statement, Appendix A (pp. 17 *et seq.*).

Reasons for Granting the Motion

Appellants, the Orleans Parish School Board, four of its five elected members and the Parish Superintendent of Schools, formally tender five questions on this appeal. Although the validity of "a packet of segregation measures" has been variously drawn in question by four of the five questions presented, appellants nonetheless concede that "all of the[se] statutes and resolutions . . . are patently unconstitutional and pose no substantial constitutional question" (Juris. Statement, pp. 10, 11). Such concession, appellees agree, is compelled by *Brown* v. *Board of Education*, 347 U.S. 483; *Id.*, 349 U.S. 294, 298; *Cooper* v. *Aaron*, 358 U.S. 1; *United States* v. *Louisiana*, 29 U.S. L. Week 4061 (U.S. December 12, 1960); *Aaron* v. *McKinley*, 173 F.Supp. 944 (E.D. Ark. 1959), affirmed *sub nom. Faubus* v. *Aaron*, 361 U.S. 197; *James* v. *Almond*, 170 F.Supp. 331 (E.D. Va. 1959), dismissed 359 U.S. 1006; *James* v. *Duckworth*, 170 F.Supp. 342 (E.D. Va. 1959), affirmed 267 F.2d 224 (4th Cir. 1959), cert. denied 361 U.S. 835.

"However," appellants assert, "the denial of the District Court of Appellants' motion to allow it to continue the operation of segregated schools in the Parish of Orleans, while the State of Louisiana pursues its attempt to assert the supremacy of its sovereignty over the Federal Courts, does present questions which are so substantial as to require plenary consideration" (Juris. Statement, p. 11). Appellees submit that this question has already been settled by this Court in *Cooper* v. *Aaron*, *supra*, and therefore, is,

so devoid of merit that the decision below on this aspect of the case should also be allowed to stand without plenary consideration. Moreover, appellees adopt the following section of the opinion below (Juris. Statement, Appendix A, pp. 37-38); and we suggest that it fully disposes of the argument renewed here by appellants:*

MOTION TO VACATE

The last matter presented for our consideration is the School Board's plea that we postpone the effective date of the order compelling desegregation of first grade classes by November 14. The Board suggests that local conditions are so disturbed that orderly compliance is difficult at this time, especially in view of its own precarious legal and financial position. All this may be true, but the history of this litigation leaves some doubt about the advisability of further postponing an inevitable deadline. Indeed, the date originally set for making a start in the direction of desegregation has already been postponed two months and it is far from clear that this delay improved conditions. But, in any event, though we be persuaded of the School Board's good faith, there can be no question of delaying still longer the enjoyment of a constitutional right which was solemnly pronounced by the Supreme Court of the United States more than six years ago. As that Court itself said in rejecting a similar plea in Cooper v. Aaron, supra, 15-16;

> "One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for these conditions compel us

* See also *Bush* v. *Orleans Parish School Board*, Civ. No. 3630, E. D. La., December 21, 1960.

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to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult, or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

"The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan v. Warley*, 245 U.S. 60, 81. Thus, law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action."

CONCLUSION

For the foregoing reasons, the questions presented by appellants are clearly unsubstantial and this motion to affirm should be granted.

Respectfully submitted,

A. P. Tureaud
A. M. Trudeau, Jr.
Ernest M. Morial
Thurgood Marshall
Attorneys for Appellees

Elwood H. Chisolm
Of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

United States of America, *v.* State of Louisiana, et al.	Motions For Stay.
Earl Benjamin Bush, et al., *v.* Orleans Parish School Board, et al.	
Harry K. Williams, et al., *v.* Jimmie H. Davis, et al.	

[December 12, 1960.]

PER CURIAM.

These are motions for stay of an injunction by a three-judge District Court which nullified a series of enactments of the State of Louisiana. The scope of these enactments and the basis on which they were found in conflict with the Constitution of the United States are not matters of doubt. The nub of the decision of the three-judge court is this:

> "The conclusion is clear that interposition is not a constitutional doctrine. If taken seriously, it is an illegal defiance of constitutional authority." *United States* v. *Louisiana*, — F. Supp. —.

The main basis for challenging this ruling is that the State of Louisiana "has interposed itself in the field of public education over which it has exclusive control." This objection is without substance, as we held, upon full consideration, in *Cooper* v. *Aaron*, 358 U. S. 1. The others are likewise without merit.

Accordingly, the motions for stay are denied.